FOO FATT CHUEN A

v.

JACOBSON CHEONG WENG HIN & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-440-2010]
29 JUNE 2011

BANKRUPTCY: *Capacity of bankrupt - Undischarged bankrupt - Carrying on business by undischarged bankrupt - Whether contractual transactions entered thereof void - Exceptions - Bankruptcy Act 1967, ss. 38(1)(d), (e)* C

CONTRACT: *Joint venture - Joint venture agreement - Best endeavours - Party to joint venture failed to inform other party of his bankruptcy status - Whether a bankrupt eligible to enter into agreement* D

The plaintiff was the founder of a group of companies among which the seventh defendant (AIGH) was the holding company. By virtue of a deal between the plaintiff and the first defendant, E the sixth defendant (AIGI) became the holding company which resulted in the plaintiff being the minority shareholder of AIGH. The plaintiff in an earlier proceedings had successfully argued that the transfer of the plaintiff's majority share in AIGH to AIGI through a step mechanism as being void as it contravened s. 132E F of the Companies Act 1965. Subsequently, the fifth defendant (AGC) became the majority shareholder and the fourth defendant was a nominee of the first defendant. The third defendant and the plaintiff respectively held 89% and 11% shares in AGC. In essence, AIGH controlled the Axis subsidiaries. The plaintiff G collaborated with the first defendant in a joint venture and signed an agreement on 16 November 2009 to develop pieces of land in Papua New Guinea (PNG). It was submitted that the first defendant had requested call cards printed for him naming him as the Managing Director of AIGI. The plaintiff and the first H defendant signed the first agreement and the second respectively on 16 November 2009 and 13 January 2010. The second agreement was signed together with the Assignment Agreement. The plaintiff submitted that he did not know that the first defendant was an undischarged bankrupt but the first defendant I submitted that the plaintiff had knowledge of his bankrupt status

and the plaintiff informed the first defendant that the first defendant's bankrupt status was not relevant. The plaintiff relying on s. 38 of the Bankruptcy Act 1967, ss. 16 and 125 of the Companies Act 1965 and ss. 24 and 66 of the Contracts Act 1950 claimed *inter alia*; a declaration that the first defendant and his nominees did not have any enforceable rights in accordance to the first and second agreements and the Assignment Agreement against the plaintiff. The first defendant argued *inter alia*: i) that the bankruptcy legislation forms a complete code and any contempt proceedings should be initiated by the Director General of Insolvency in a bankruptcy court, and cannot provide and confer a private cause of action to the plaintiff; and ii) that a bankruptcy is never *per se* prohibited from entering into a contract.

Held (allowing the plaintiff's claim with costs to be taxed):

(1) There were sufficient evidence to establish elements of an entering into, or carrying on of a business by the very terms of the relevant agreements. Based on the accepted principles of illegality, it is plain that the legislative intent of s. 38(1)(d) of the Bankruptcy Act ("the Act") is not to condone any act of the undischarged bankrupt in relation to the entry into or the carrying on of a business, or a company, unless he has the prior permission of the Director General of Insolvency (DGI). To protect his creditors and sections of the public at large who may be persuaded unsuspectingly to have business dealings with him, it must surely be right for the law to regard his contracts for any of these purposes to be held void. A similar reasoning should apply in relation to the effects of the prohibition in s. 38(1)(e) of the Act. The existence of s. 38(2) of the Act cannot be a sufficient reason to displace the argument that the contracts are to be held void. (pp 26 & 27)

(2) The plaintiff knew of and confirmed the first defendant's bankruptcy status only much later when the DGI wrote to confirm the first defendant was an undischarged bankrupt on 1 October 2010. Thus when the Memorandum of Agreement dated 16 November 2009, the Supplementary Agreement dated 13 January 2010 and the Assignment Agreement dated 13 January 2010 were executed, the plaintiff had not been told by the first defendant that he was an undischarged bankrupt. (p 29)

(3) There has been a breach of s. 38(1)(d) of the Act and s. 109(1)(m)(i) of the same. Although the court was not sitting as a Bankruptcy Court and there has been no application by the DGI in reference to these provisions, this court cannot ignore the legal effects of illegality of the concerned agreements between the parties pursuant to s. 24(a)(b) and (e), read in conjunction of with s. 66 of the Contracts Act 1950. (p 30)

Case(s) referred to:

Clarke v. Chadburn [1985] 1 All ER 211 ***(refd)***

De Choisy v. Hynes [1937] 4 All ER 54 ***(refd)***

Kwan Chew Shen v. Citibank, NA [1987] 1 CLJ 314; [1987] CLJ (Rep) 704 HC ***(refd)***

MBF Finance Bhd v. Sykt Noma Pengangkutan Sdn Bhd & Yang Lain [1999] 4 CLJ 734 HC ***(refd)***

Nash v. Halifax Building Society [1979] 2 All ER 19 ***(refd)***

Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC ***(refd)***

The Co-operative Central Bank Limited (in receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

The Topps Company Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ Supp 235 HC ***(refd)***

Yango Pastoral Company Pty Ltd v. First Chicago Australia Ltd (1978) 139 CLR 410 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 2, 24, 38(1)(d)(e), (2), 66, 109(1)(m)(i)

Companies Act 1965, ss. 16, 125, 132E, 162(1), 181

Contracts Act 1950, ss. 24(a), (b), (e), 66

Rules of the High Court 1980, O. 29 r. 5

For the plaintiff - Logan Sabapathy (Tharminder Singh, S Bhuvaneswary & Saira Baharin with him); M/s Izral Partnership

For the 1st defendant - Selva Balan Sinnan; M/s Azman Joseph & Assocs

For the 2nd defendant - Nik Syahril Nik Abdul Rahman (Fajrul Shihar Abu Samah with him); Department of Insolvency Malaysia

For the 3rd & 4th defendants - Owee Chia Ming; M/s Owee & Ho

For the 5th & 6th defendants - Ravindran Shanmuganathan (Azween with him); M/s Sreenevasan Young

Reported by Anesa Karisma

A

JUDGMENT

Mohamad Ariff Yusof J:

Background Facts

B **[1]** The plaintiff, Foo Fatt Chuen or "Fudge Foo" ("Foo"), is the founder of a group of companies known as the Axis Identity Group of Companies where the holding company was initially the 7th defendant, Axis Identity Group Holdings Sdn Bhd (AIGH). Arising from dealings between the plaintiff and the 1st defendant, C Jacobson Cheong ("Jacob Cheong"), the holding vehicle was transformed into the 6th defendant, Axis Identity International Sdn Bhd (AIGI), with the shareholding of the plaintiff reduced from a majority to a minority position. I have dealt with an aspect of the corporate restructuring in my earlier decision in D D-24NCC-262-2010, where the transfer of shares from the plaintiff in AIGH to AIGI through a step mechanism, was held as violative of s. 132E of the Companies Act and therefore void. I had then set another date for further submissions for the parties to argue on the consequential orders to follow from this decision.

E

[2] The purported transfer was the 65.8% of the plaintiff's shareholding in AIGH to AIGI. After a further share swap and share issue, the plaintiff ended up owing just 20% of the shares in AIGI. The 5th defendant, Axis Global Capital Berhad (AGC) F became the majority shareholder with 57%. Another shareholder, Foo Lai Yoke ("FLY"), holds another 20%. FLY is a nominee of Jacob Cheong, and appears to be his ex wife. This is what the 1st defendant says in his affidavit in reply on this matter:

> G As far as Madam Foo is said to be my wife, I wish to put on record that my marriage with Madam Foo ended in divorce. Madam Chan is not my present wife either. I wish to further state that Madam Chan and Madam Lai Yoke became shareholders and directors by virtue of the Memorandum of Agreement and the Supplemental Memorandum of Agreement H which the Plaintiff is fully aware of and agreed to.

[3] Madam Chan, who is referred to, is none other than the 3rd defendant in the present proceedings, and she holds 89% of the shares in AGC. The plaintiff only holds 11% in AGC.

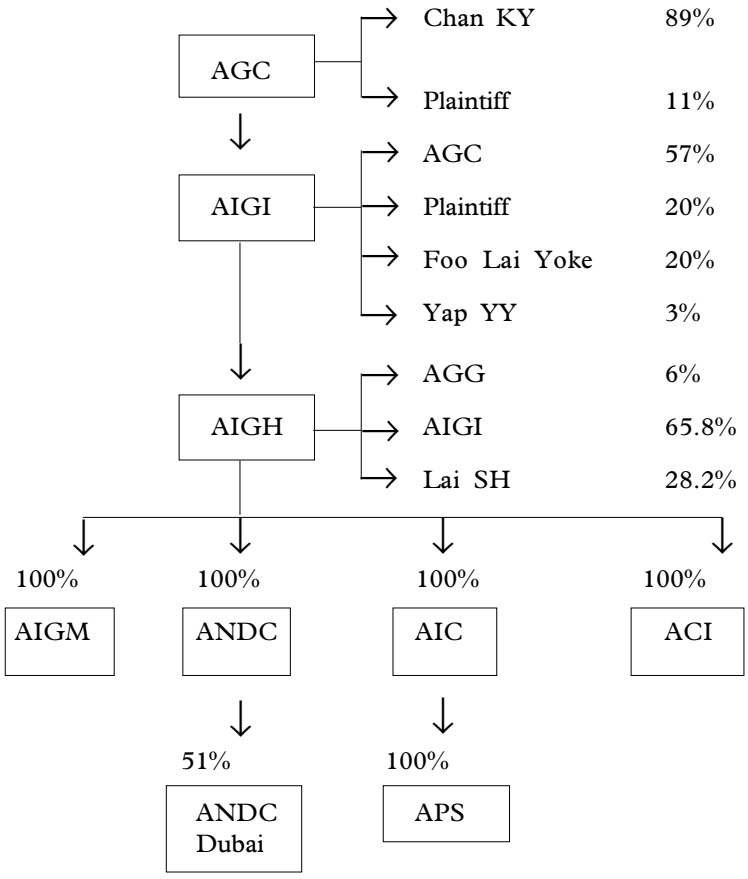
I

[4] Madam Lai and Madam Chan are on record as having the same address as the 1st defendant.

[5] Thus in summary, the effect of the transfers and share swaps was the plaintiff held only 11% of the shareholding in AGC; AGC holds 57% shares in AIGI; AIGI holds 65.8% of the shares in AIGH, and through AIGH controls the Axis subsidiaries.

[6] The shareholders of AIGH, after the transfers and the swaps, then consisted of AIGI as the 65.8% shareholder, AGC as 6% shareholder, and one Lai Siew Hong holding 28.2%.

[7] For clarity and ease of reference, I incorporate below the intricate corporate relationship in diagrammatic form (as usefully summarised on p. 70 of Core bundle A):



[8] The dealings between the plaintiff and the 1st defendant concern in part the development of certain pieces of land in Papua New Guinea into some large housing development projects, described variously by such colourful names as the KoKi Nest Site, Kalang Site and Chancellor Site projects. The 1st defendant, according to the plaintiff, was initially introduced to him in Dubai by a certain Mr Che KL, who was at the material time the Group CEO of the Axis Identity Group of Companies. The 1st defendant was introduced to him as a successful businessman of serious means "who was undertaking development projects of an international flavour", and a lawyer by training. This was in 2008. Sometime towards the last quarter of 2009 Foo was again contacted by Jacob Cheong, through Che KL. This time apparently Jacob Cheong proposed a joint venture to the plaintiff on what the plaintiff has described as "international large return projects". According to the plaintiff's nomenclature, these were "Jacob's Big Deals". The plaintiff agreed to collaborate on the joint venture and both of them apparently identified AIGI as the joint venture vehicle. AIGI was chosen because it was already the vehicle for the plaintiff's foreign design business. Sometime in November 2009, to be exact 16 November 2009, Foo and Jacob Cheung entered into a "Memorandum of Agreement" which *inter alia* contained the following recital:

> FFC and JC have agreed to combine the financial and business network strength of JC with established operations in system strengths of FFC in Axis Identity Group International Sdn Bhd ... a company involved in investment holding, business and activities of management consultancy ("AIGI") for common profit, in the manner set out below.

[9] It is useful to note how this first agreement defines "Purpose of AIGI". The purpose is defined with reference to the "PNG Project" by which there was to be a land development and the onward sale of housing units to the Housing Board Corporation of Papua New Guinea.

[10] Prior to the signing of the Memorandum of Agreement dated 16 November 2009, Foo and Jacob Cheong had paid two exploratory visits to Papua New Guinea, together with Che KL. An introduction to the PNG National Housing Corporation took place, and a Memorandum of Understanding was signed between the NHC and AIGI. The plaintiff signed on behalf of AIGI.

[11] During the first exploratory meeting, the evidence disclosed the 1st defendant had requested that call cards be printed for him describing him as Managing Director of AIGI. The plaintiff apparently agreed and connived with this misrepresentation to the PNG parties.

[12] The first agreement was followed by a second agreement between the plaintiff and the 1st defendant. This second agreement specifically identified AGC as the corporate vehicle through which the 1st defendant's interests were to be represented, and the resultant share structures which followed had been described earlier. This vehicle was also to be the entity to which the other big deals in PNG would be housed.

[13] The second agreement also referred to the land development projects which replaced the earlier projects which were earlier identified in the MOU with the PNG NHC. The 1st defendant had successfully negotiated with the influential Chan family of Papua New Guinea to develop three pieces of land identified as KoKi Nest, Chancellor and Kalang sites. The 1st defendant then assigned these agreements to AIGI.

[14] Disputes then arose between the parties because, according to the plaintiff, the 1st defendant had failed to bring in the necessary funding as promised, but had instead financially bled the Axis subsidiaries. It also appears that the PNG development projects did not materialise, with the result that the 1st defendant through his nominees had assumed majority control of AIGI, AIGH and the Axis subsidiaries without any cash outlay.

[15] At this stage, the plaintiff then pursued the 24NCC-262-2010 action, which I had allowed and held the transfers of the plaintiff's majority shares in AIGH to AIGI, through the step mechanism, were void as contravening s. 132E of the Companies Act 1965.

[16] This present action is brought, according to the plaintiff, after he found out the 1st defendant was an undischarged bankrupt at all material times. According to the plaintiff, he came to know of the 1st defendant's bankruptcy status on in the course of related proceedings in OS 24-262-2010:

A In the course of the hearing of a related proceedings namely Kuala Lumpur High Court Originating Summons No 24-262-2010, I am advised that a statement was made by counsel on 10.12.2010 that the above named 1st defendant is an undischarged bankrupt. See paragraph 3 of the plaintiff's first affidavit.

B **[17]** The 1st defendant of course denies this allegation and maintains that the plaintiff knew he was a bankrupt before the first agreement (the memorandum of agreement) was signed. At a meeting in November 2009 at Hilton Sentral Hotel after they returned from PNG, and before they signed the first agreement, C the 1st defendant told him of his bankruptcy status. The plaintiff, according to the defendant, told him it did not matter "so long as there are business opportunities coming in" through his efforts. See para. 49 of the 1st defendant's affidavit in reply, which was belatedly filed.

D

The Reliefs Prayed

[18] The foundation of this present suit is the alleged non-declaration of the bankruptcy status and its effects on rights E flowing from the agreements entered into by the 1st defendant. As stated in the supporting grounds:

(A) With the disclosure now made that the 1st Defendant is and was at all material times an undischarged bankrupt, the 1st Defendant and his nominees are not entitled to assert rights F pursuant to the agreements entered into by the 1st Defendant.

(B) Consequential orders are necessary to adjust rights consequent to the unenforceability of those agreements without prejudice to the Plaintiff's rights to commence action G against the 1st Defendant, his nominees and/or agents.

[19] The reliefs prayed for comprise the following:

1. Declaration that the 1st Defendant, his nominees and/or assigns do not have any enforceable rights under and H pursuant to the Memorandum of Agreement dated 16.11.2009 and the Supplementary Agreement dated 13.1.2010 entered into between the 1st Defendant and the Plaintiff or for that matter, the Assignment Agreement dated 13.1.2010 entered into between the 1st Defendant and the I 6th Defendant.

2. That the Register of Members of the 5th, 6th and 7th Defendants be rectified to the position prior to 16.11.2009 upon such terms and conditions as this Honourable Court deems just.

3. An injunction directed against the 1st, 3rd and 4th Defendants, their nominees and assigns from holding themselves out as being any part of the Axis Identity Group including and not limited to holding themselves out as officers or stakeholders of the 6th and 7th Defendants and their subsidiaries.

4. That leave be granted to the Plaintiff to commence such action against the 1st, 2nd and 3rd Defendants, their nominees or assigns as well as others as he may deem necessary to address the financial consequences, losses and other relief as the Plaintiff may be advised to pursue.

5. Further or other relief including costs.

[20] The dispute between the parties has turned out to be very acrimonious, with allegations and counter-allegations being leveled by one against the other. The 1st defendant appears to maintain a position that he has done his part in procuring the development contracts from the Chan family of PNG, and the failure of the projects to take off was due to acts of the plaintiff. The plaintiff on the other hand places the blame squarely on the 1st defendant for his failure to bring in the promised financial support. Instead the 1st defendant and his nominees have financially bled the Axis Group of Companies. There are allegations and counter-allegations of money laundering, and oppression. There was even one s. 181 oppression petition filed by the 1st defendant, but this was withdrawn subsequently. According to the plaintiff, the petition was filed because the 1st defendant wanted to extract a cash payment from the plaintiff in return for an exit from the Axis Group.

The Clinical Approach: Breaches Of Bankruptcy Act 1967, Companies Act 1965 And Contracts Act 1950

[21] On the initiative of the plaintiff's counsel, Mr K Sabapathy, this court was invited to treat this dispute on the basis of a "clinical approach", meaning to simply look at the subject agreements and decide whether or not the consideration or object of these agreements is void having regard to the governing law, in this instance principally provisions of the Bankruptcy Act 1967,

A Companies Act 1965, and the Contracts Act 1950. There was *consensus* on this. In this connection, I was invited to order an early trial under O. 29 r. 5 of the Rules of the High Court and to conduct the trial on the basis of the "clinical approach." There has been *consensus* on this.

B

[22] The main issue in this application centred on the effects of the bankruptcy laws on these agreements, and to this extent I was of the view no prolonged cross-examination of the deponents of the affidavits was required, since the issue was one of law on the C validity of the agreements. I thus directed and allowed only a limited cross-examination on the issue of knowledge of the plaintiff as to the bankruptcy status of the 1st defendant at the material times. This issue is of great relevance in the context of s. 109(1)(m) of the Bankruptcy Act, reading:

D

109 Punishment of Fraudulent Debtors

(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with E imprisonment, which may extend to two years, or with fine or with both:

...

(m) If being an undischarged bankrupt:

F

(i) Either alone or jointly with any other person he obtains credit to the extent of one thousand ringgit or upwards, unless he proves that before obtaining the credit he informed the person giving the credit that he was an undischarged bankrupt; or

G

(ii) Either alone or jointly with any other person he engages in any trade or business or enters into any contract in furtherance of any trade or business, unless he proves that before engaging in the trade or business or before entering into the contract he informed the person with H whom he engages in the trade or business or with whom he entered into the contract that he was an undischarged bankrupt; ...

[23] I will return to the evaluation of the cross-examination shortly, after considering the arguments taken by the parties. I

[24] It is to be noted that due to this limited cross-examination, the "clinical" approach has *per se* to consider and evaluate the relevant evidence disclosed in the limited cross-examination too.

Plaintiff's Arguments

[25] The primary prayer in the originating summons is for a declaration on enforceability of the above mentioned three agreements dated 16 November 2009 and 13 January 2010. Reliance is made to s. 38 of the Bankruptcy Act in particular, ss. 16 and 125 of the Companies Act, and ss. 24 and 66 of the Contracts Act.

Section 38(1)(d) and (e) are the relevant provisions, reading:

> **38 Consequences of refusal of discharge;**
>
> (1) Where a bankrupt has not obtained his discharge:
>
> ...
>
> (d) The bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;
>
> (e) The bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, and of the following persons, namely:
>
> (i) His spouse;
>
> (ii) A linear ancestor or a lineal descendant of his or a spouse of such ancestor or descendant; or
>
> (iii) A sibling of his or a spouse of such sibling.
>
> ....
>
> (2) A bankrupt who makes default in performing or observing this section or a condition imposed pursuant to subsection (1A) shall be deemed guilty of a contempt of court, and shall be punished accordingly on the application of the Director General of Insolvency.

[26] Counsel invited the court to consider the purpose behind these provisions, and to also have regard to s. 38(1)(b), which requires the bankrupt to render to the DGI every six months an account of all moneys and property which shall come to his hands for his own use during the preceding six months, and shall pay and make over to the Director General of Insolvency so much of the same moneys and property as have not been expended in the necessary expenses of maintenance of himself and his family.

[27] Under s. 2 of the Bankruptcy Act, "property" is defined as including "things in action" and "every description of property whether real or personal" and "every interest and profit vested arising out of or incident to property ...

[28] Counsel links the provisions with s. 24 of the Contracts Act, particularly s. 24:

> The consideration or objects of an agreement is lawful, unless:
>
> (a) It is forbidden by a law;
>
> (b) It is of such a nature that, if permitted, it would defeat any law;
>
> (c) It is fraudulent;
>
> (d) It involves or implies injury to the person or property of another; or
>
> (e) The court regards it as immoral, or opposed to public policy.

[29] The argument taken is that to allow the agreements by the undischarged bankrupt to stand will be to condone agreements whose consideration is unlawful as something forbidden by the Bankruptcy Act, or is of such a nature that it would defeat the Act.

[30] The agreements not having the prior permission of the DGI, have to be regarded as void, and as such s. 66 of the Contracts Act applies to allow restoration of rights:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it.

[31] The "advantage" received by the 1st defendant and his nominees has therefore to be restored to the plaintiff.

[32] The common law principle that a contemnor ought not to be permitted to enjoy, or keep the fruits of his contempt, is also stressed, based on the argument that s. 38(2) deems it a contempt of court for the bankrupt to commit any default under s. 38(1A). The English case of *Clarke v. Chadburn* [1985] 1 All ER 211 is cited for the proposition that a defendant cannot be allowed to enjoy the fruits of his defiance under such circumstances:

> If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequence of what has been done in breach of the law may be plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them. (per Megarry VC, at p. 214)

[33] Based on these authorities, it was argued that this court has the power to order disgorgement of the "fruits" of the agreements by the 1st defendant and his nominees.

[34] This is also apart from the ability of the court to so order under s. 162(1) of the Companies Act, which refers to the court's power to order rectification of the register where the name of a person has been entered "without sufficient cause".

[35] On the issue of knowledge and *pari delicto*, it was argued that the plaintiff did not know of the 1st defendant's bankruptcy status until much later. Nevertheless, counsel for the plaintiff also addresses this issue on the basis the facts here fall within one of the recognised exceptions to the *pari delicto* rule, citing *inter alia*, *Nash v. Halifax Building Society* [1979] 2 All ER 19, and our own Supreme Court decision in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266:

> ... the law on this point is as a general rule ... although no action can arise from a prohibited and illegal act, if the Plaintiff can show that he is a member of a class for whose protection the statutory prohibition was imposed, then as an exception such a person can enforce rights or recover property transferred under the illegal transaction.

The Defendants' Arguments

[36] The defendants took, to a large extent, a common stand. In regard to s. 38(1)(d) and (e) of the Bankruptcy Act, this is how the defence is advanced based on the "collective skeletal submission" of the defendants:

> Section 38(1)(d) of the BA prohibits a bankrupt, without the previous permission of the director general of insolvency ... or the court:
>
> – Either alone or in partnership "enter into any business" or "carry on any business"; or
>
> – "become a director of any company"; or
>
> – Otherwise "directly or indirectly" take part in the management of any company.
>
> Similarly, section 38(1)(e) of the BA prohibits the 1st Defendant, without the previous permission of the DGI or of the court:
>
> – "engage in the management or control of any business carried on by or on behalf" of the 1st Defendant's spouse.
>
> ...
>
> The 1st Defendant was not appointed director of any of the relevant companies, the 5th Respondent ("AGC"), the 6th Respondent ("AIGI") or the 7th Respondent ("AIGH") ...
>
> There is no entry or carrying on of any business by the 1st Defendant, either alone or in partnership. The companies are corporate structures.
>
> Shareholders do not have management rights. As such, allocation of shares to "contractual nominees" is not relevant.
>
> At best, by virtue of the right to nominate directors, the MOA and/or the SMOA, there is merely evidence of the 1st Defendant's opportunity to indirectly participate in the management of the companies.

> We submit that to show indirect participation of management, it is incumbent on the Plaintiff to adduce factual evidence showing that the nominee directors in fact manage the companies upon instructions of the 1st Defendant. This is essentially a question of fact …
>
> However, the Plaintiff seeks to take the Clinical Approach without reference to the disputed facts.
>
> As such, we respectfully submit that there is no evidence of any purported breach of section 38(1)(d) and (e) of the BA.

[37] At this juncture it is necessary to add that it is the 1st defendant who has raised the issue of *pari delicto*, by referring to the document described as "affidavit and self declaration affirmed by the plaintiff, to be found in Core Bundle 'B', p. 36." This peculiar document states *inter alia*:

> … (1) THAT I [Foo] have entered and participated in the above dealings, projects and undertakings on my own free will, choice and purpose without reliance on any information, representation and persuasion from JC …

[38] This reference to the document is then extended to the argument that the plaintiff has thereby disabled himself from taking the issue under s. 38 of the Bankruptcy Act. This argument is nothing short of a *pari delicto* point. As such, I directed the immediate parties, the plaintiff and the 1st defendant, to be cross-examined on this issue, in the course of which relevant evidence has been presented to this court.

[39] I am therefore not persuaded that the "clinical" approach must necessarily be regarded as a pure exercise in legal arguments on the bare agreements without any consideration of the context. Indeed, the defendants' argument on this, when pushed to its logical conclusion, will mean this: after agreeing to the clinical approach, the defendants are now saying the very same clinical approach will disallow the plaintiff to run his argument that there has been a breach of s. 38. As submitted by Mr Owee, counsel for the 3rd and 4th defendants, the facts show at best a contractual nomineeship to hold shares, but not to take part in management. The clinical approach cannot determine whether the plaintiff has taken part in management, since evidence has to be led on this. This is, with respect, a fine line-drawing exercise.

[40] The rest of the defendants' arguments relate to issues of jurisdiction and general principles on the effects of illegality in matters of contract. It is argued that the bankruptcy legislation forms a complete code, and any contempt should be contempt to be initiated by the Director General of Insolvency in a bankruptcy court, and cannot provide and confer a private cause of action to the plaintiff.

[41] As for the issue of illegality, I am asked to adopt the "more modern" approach to the issue, namely the court should be slow to strike down an act as void, since not all acts in breach of a statutory provision must necessarily be regarded as void. By the more modern approach, the defence is of course referring to the approach enunciated in, for example, the leading High Court of Australia case of *Yango Pastoral Company Pty Ltd v. First Chicago Australia Ltd* (1978) 139 CLR 410, where Mason J *inter alia*, held:

> The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract is prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.

[42] As our own Federal Court has recognised (drawing on *Yango Pastoral*), it is a matter of construction of the particular statute – a principle which is not by any means extraordinary. See *The Co-operative Central Bank Limited (in receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300.

[43] The court, it is argued, should look at the full scheme of the Bankruptcy Act, and since it provides for contracts executed by a bankrupt to enter into business with the previous permission of the Director General of Insolvency, s. 24 of the Contracts Act should have no role to play. A bankrupt, so the argument goes, is never *per se* prohibited from entering into a contract.

Evaluation

[44] I have evaluated the arguments advanced and considered the comprehensive range of authorities cited, and I am of the view that the issue on jurisdiction is unpersuasive and not directly relevant on the facts here. It is plain that this court is not exercising a bankruptcy jurisdiction, and is not directly concerned with an argument of contempt being committed by the bankrupt. The issue is one of illegality, and whether given the legislative framework, the relevant agreements here have become tainted with illegality and therefore void, leading to the need to have the financial benefits derived by the bankrupt, whether directly or through his nominees, disgorged.

The Law On Contracts Entered Into By A Bankrupt

[45] The general rule that a bankrupt can enter into a contract is not directly relevant on the facts here. True enough in *Kwan Chew Shen v. Citibank, NA* [1987] 1 CLJ 314; [1987] CLJ (Rep) 704, for instance, it was held that there appeared to be no blanket provision anywhere in the Bankruptcy Act to the effect that a bankrupt was incapable of entering into a contract. It is of significance to note the following passage by VC George J (as His Lordship then was) from the case to give the ruling its proper context:

> Before concluding it is perhaps relevant to consider one other aspect of the matter based on the wide belief that once a person is adjudged bankrupt the right to enter into contracts ceases until such time as he is discharged.
>
> This is an erroneous belief.
>
> Sections 36 and 38 of the Bankruptcy Act set out the disqualifications and disabilities of a bankrupt. *Inter alia* he may not hold certain offices, he may not sue without the sanction of the Official Assignee, he may not without the permission of the Official Assignee enter into or carry on any business, become a director (or take part in the management) of any company and so on. While he may not enter into a contract that would amount to his carrying on a business, it is significant that there is no blanket prohibition, express or implied, for a bankrupt to enter into a contract. (at p. 708 of the report)

[46] This general rule therefore cannot be taken as implying that the bankrupt who purports and represents to enter into a business dealing with another without disclosing his bankruptcy can shelter behind this rule. The more relevant provisions in the Bankruptcy Act, as earlier noted, are s. 109 and s. 38(1)(d) and (e) and s. 38(2).

[47] Both sections were referred to in the High Court case of *The Topps Company Inc v. Mally Jaya Sdn Bhd* [1998] 2 CLJ Supp 235, which was a case relating to a Trade Description Order, but the general principles are equally applicable to his instant case. Law Hop Bing J (as His Lordship then was) held at p. 239 of the report as follows:

> In my judgment, a person who is an undischarged bankrupt at the time of affirming an affidavit must disclose his incapacity eg, his status as an undischarged bankrupt to the attention of the court, especially where, as in this case, the affidavit is in support of an *ex parte* application which is an application *uberimae fidei* ... The non-disclosure of this material fact pertaining to the deponent's capacity as an undischarged bankrupt as falling short of the standard of utmost good faith and the *ex parte* TDO granted pursuant thereto should, on the ground alone, be set aside ...
>
> Section 38(1)(d) and section 109(m) & (d) of our Bankruptcy Act 1967 ... clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the deponent holding himself out in his affidavit as, a "general manager" where the deponent was an undischarged bankrupt at the time of affirming his affidavit.

[48] Compare *MBF Finance Bhd v. Sykt Noma Pengangkutan Sdn Bhd & Yang Lain* [1999] 4 CLJ 734 which seems to imply that it would be in order for a bankrupt to sign an agreement for and on behalf of a company if he is authorised by the Board of Directors to do so, but in this case s. 109 of the Bankruptcy Act was not cited before the court.

[49] See also *De Choisy v. Hynes* [1937] 4 All ER 54, for a common law authority which lays down a similar principle as in *The Topps Company Inc v. Mally Jaya Sdn Bhd, supra*:

> ... where there is obtained by a person who is an undischarged bankrupt a contract by which he becomes entitled to get, from the person with whom he has entered into the contract, credit ..., without disclosing the fact that he is an undischarged bankrupt, that contract is unenforceable by the undischarged bankrupt. The undischarged bankrupt has failed to perform the duty which the section plainly imposes upon him, and, in those circumstances, it is impossible, in my opinion, for such a contract to be enforced. (at pp. 57 - 58 of the Report, per Bennet J)

[50] On the facts of this case, there is sufficient evidence to establish elements of an entering into, or a carrying on of a business by the very terms of the relevant agreements. It is necessary to stress the width of s. 38 of the Bankruptcy Act, in particular s. 38(1)(d) which refers to "(d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company." Based on the accepted principles on illegality, as noted above, it is plain the legislative intent of the Bankruptcy Act is not to condone any act of the undischarged bankrupt in relation to the entry into or the carrying on of a business, or in relation to directly or indirectly taking part in the management of a company, unless he has the prior permission of the Director General of Insolvency. To protect his creditors and the sections of public at large who may be persuaded unsuspectingly to have business dealings with him, it must surely be right for the law to regard his contracts for any of these purposes to be held void. A similar reasoning should apply in relation to the effects of the prohibition in s. 38(1)(e). Section 38(2) then provides for the penal consequences arising from what is deemed to be contempt of court which is punishable upon an application of the Director General of Insolvency. The existence of s. 38(2) cannot, to my mind, be a sufficient reason to displace the argument that the contracts are to be held void.

Assessment Of The Cross-examination

[51] As for the issue of whether the plaintiff knew of the bankruptcy status, for which the limited cross-examination was directed, I can only conclude on the evidence that the plaintiff's version of the facts is more probable. I have observed the

A demeanour of both the plaintiff and the 1st defendant during the course of the cross-examination. The plaintiff strikes me as being more candid, truthful and consistent in his testimony. The 1st defendant, on the other hand, was evasive and somewhat guarded when questions were posed on whether he informed the parties
B in PNG about his bankruptcy status. From his answers, he admitted he did not inform the plaintiff he was an undischarged bankrupt throughout the time they were in PNG and meeting up with the PNG parties. The plaintiff's explanation of the events that transpired in November 2009 in Hilton Sentral is improbable.
C It even appears, assuming the plaintiff's version is accepted, that information on his bankruptcy status was not even volunteered by him. I quote the relevant parts of his testimony:

Judge: What exactly did you tell Mr. Foo when you met him
D at Hilton Sentral, with respect to your bankruptcy status?

D1: Upon our return from Port Moresby, Client have sent in 2 different sets of draft MOAs.

E I'll try to explain how we had the meeting around that day. So he rang me up and we met at Hilton Sentral and so he was talking about the MOA with me.

Then you know, he said he feels a little bit funny why I don't put in my name, so I say to him I'm a
F bankrupt. And apparently at that point in time, Che Kim Ling, his good friend for 19 years, was with him.

At that time, I told them, because I can't.

Judge: So you didn't volunteer the information that you were a
G bankrupt.

D1: No ...

Judge: So before that, he didn't know that you were a bankrupt - when you were in PNG, he didn't know?

H D1: Because when we went to PNG, nothing materialized, and it's premature, nothing concrete ...

Judge: Did anyone know you were a bankrupt?

D1: I'm not doing anything.
I

[52] Although demeanour by itself may not be a safe guide to test the truth, having considered the entirety of the evidence and the available contemporaneous evidence, and the probabilities of the case, I am of the view that the plaintiff knew of and confirmed the 1st defendant's bankruptcy status only much later when the Director General of Insolvency wrote to confirm the 1st defendant was an undischarged bankrupt on 1 October 2010. It could not have been sometime in November 2009, as alleged by the 1st defendant. Thus when the memorandum of memorandum of agreement dated 16 November 2009, the supplementary agreement dated 13 January 2010 and the assignment agreement dated 13 January 2010 were executed, the plaintiff had not been told by the 1st defendant that he was an undischarged bankrupt.

[53] It is telling in this connection to note that even a Director of the 5th, 6th and 7th defendants, Mohd Raziff bin Tun Zahir, in the affidavit affirmed by him (5th and 6th defendants' affidavit No. 1) had this to say:

> 43 ... I only came to know of Jacob's bankruptcy on or about 6.12.2009. I accordingly instructed AGC's solicitors to disclose that fact to the court when AGC's intervener application came up for hearing on 10.12.2010 in OS No. 262. (See p. 81 of Core Bundle A).

[54] The 1st defendant's bankruptcy status thus appears to have been formally disclosed to the court only in December 2010. Even AGC's solicitors did not knew of the status until informed sometime in December 2010, and AGC is an important corporate vehicle for the 1st defendant.

Conclusion

[55] Having considered the evidence, both documentary and testimonial (arising from the limited cross-examination directed), and tested the oral evidence against the documents, and applying the law to the findings of facts in this application, I am of the view there has been a breach of s. 38(1)(d) of the Bankruptcy Act and s. 109(1)(m)(i) of the same. Although this court is not sitting as a Bankruptcy Court and there has been no application by the DGI in reference to these provisions as yet, nevertheless this court

A cannot ignore the legal effects of illegality on the concerned agreements between the parties pursuant to s. 24(a), (b) and (e) of the Contracts Act read in conjunction with s. 66.

[56] On the evidence, there has been no *pari delicto* on the part
B of the plaintiff. I am therefore allowing the plaintiff's claim as prayed in the originating summons, prayers (1), (2), (3), (4) and (5). Costs to be taxed to be paid by the 1st, 3rd and 4th defendants to the plaintiff.

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